(7)

No. 91-905

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

JENNY LISETTE FLORES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Pursuant to 8 U.S.C. 1252(a)(1), the Immigration and Naturalization Service (INS) frequently retains custody of aliens under the age of 18 who are charged with being deportable, in circumstances where there is no parent, legal guardian, or other related adult available to care for the juvenile. 8 C.F.R. 287.3 requires INS to establish a prima facie case of deportability to an examining officer within 24 hours. The juvenile thereafter may seek an additional hearing before an immigration judge under 8 C.F.R. 242.2(d). If the juvenile is not released, INS places the juvenile in special child-care facilities for alien juveniles pending the location of a related adult or legal guardian or conclusion of the deportation proceedings. The questions presented in this case are these:

1. Whether the regulations violate the substantive due process component of the Fifth Amendment, or any other provision of the Constitution, because INS does not routinely release these juveniles to unrelated adults.

2. Whether the procedures violate the Due Process Clause of the Fifth Amendment because (a) once the examining officer has determined that there is a prima facie case of deportability, INS does not hold additional hearings to determine probable cause except upon request, or because (b) INS does not conduct individualized hearings to determine whether unrelated adults seeking custody pose a risk of harm to the juveniles.

PARTIES TO THE PROCEEDINGS

Petitioners are William P. Barr, Attorney General of the United States; Immigration and Naturalization Service; and Richard Rogers, Acting Regional Administrator of the Immigration and Naturalization Service.

Respondents are Jenny Lisette Flores, a minor, by next friend Mario Hugh Galvez-Maldonado; Dominga Hernandez-Hernandez, a minor, by next friend Jose Saul Mira; and Alma Yanira Cruz-Aldama, a minor, by next friend Herman Perililo Tanchez.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-69a) is reported at 942 F.2d 1352. The opinion of the panel of the court of appeals (Pet. App. 70a-144a) is reported at 934 F.2d 991.[1] The order of the district court (Pet. App. 145a-147a) is unreported.

[1] An earlier version of the opinion of the panel of the court of appeals was reported at 913 F.2d 1315, but was superseded by the opinion reported at 934 F.2d 991.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1991. On October 30, 1991, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including December 7, 1991. The petition for a writ of certiorari was filed on December 9, 1991 (a Monday). This Court granted the petition on March 2, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Habeas Corpus Clause, Article I, Section 9, Clause 2, provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

2. The Fifth Amendment provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

3. 8 U.S.C. 1252(a)(1) and 1357(a)(2) are set forth at Pet. App. 206a-207a.

4. 8 C.F.R. 242.2, 242.24, and 287.3 are set forth at Pet. App. 207a-221a.

STATEMENT

This case involves the response of the Immigration and Naturalization Service (INS) to a difficult and frequent problem: how to care for unaccompanied alien juveniles pending hearings on deportation charges. INS has concluded that it generally should release such juveniles to their parents, legal guardian, or other related adults. If none of those persons are available, however, INS normally entrusts their care to special child-care facilities supervised by the

Department of Justice. The court of appeals concluded that INS's procedures in this respect satisfy applicable statutory requirements, but held that the Constitution requires INS, unless it has specific evidence that the particular adults seeking custody will harm the juveniles, to release the juveniles to unrelated adults willing to assure the juveniles' presence at subsequent administrative hearings.

1. Congress has recognized that effective enforcement of the Nation's immigration laws necessarily requires power to arrest and detain aliens suspected of unlawful entry. Accordingly, 8 U.S.C. 1357(a)(2) authorizes INS to arrest an alien without a warrant if the arresting officer "has reason to believe that the alien so arrested is in the United States in violation of any * * * law or regulation and is likely to escape before a warrant can be obtained for his arrest." [2] Congress further required that an alien arrested under this section "shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." Section 1357(a)(2). This case concerns a challenge to the fundamental fairness of INS procedures pertaining to the detention of juveniles arrested pursuant to this statutory authority. We shall, accordingly, set forth those procedures in some detail.

a. Before deportation charges are instituted, apprehended individuals are first afforded the oppor-

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[2] Title 8 also establishes procedures for arrests pursuant to warrants, but such warrants can be issued only if INS can establish probable cause to believe the alien is deportable, and only if INS already has instituted deportation proceedings before an immigration judge, as set forth in 8 C.F.R. 242.1(a), 242.2(c).

tunity to voluntarily depart the country under 8 U.S.C. 1252(b).[3] If the alien declines voluntary departure, his case is reviewed by an INS examiner within 24 hours of arrest, 8 C.F.R. 287.3, and he may request a further hearing before an immigration judge.

INS procedures require that detained juveniles be fully informed of these options. Under 8 C.F.R. 242.24(g), the juvenile "shall be provided access to a telephone and must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list."[4] After the juvenile has completed the phone call,[5] INS furnishes

[3] That Section provides, in pertinent part:

> In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings * * * need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States.

[4] The first sentence of Section 242.24(g) provides that juveniles from Mexico and Canada need only be informed of the opportunity to make a phone call; they need not actually contact someone. Pursuant to the Instructions to Form I-770, the agent must "make a record of any refusal to accept our offer of a telephone call." See App., *infra*, 1a. Pursuant to treaty obligations, however, the United States must contact "consular or diplomatic officers whenever nationals of [Canada or Mexico] are detained * * *, whether of the opportunty to make a telephone call; they need not requests that no communication be undertaken in his behalf." 8 C.F.R. 242.2(g). In any event, this case does not involve a significant number of juveniles from Canada or Mexico. See note 12, *infra* (describing the nationality of detained juveniles).

[5] See Instructions to Form I-770 ("[T]he minor cannot be asked to voluntarily depart until after telephone access is provided."), App., *infra*, 1a.

the juvenile a Form I-770, titled "Notice of Rights and Request for Disposition." That notice is available in both English and Spanish versions. See App., *infra*, 1a-4a. INS regulations further provide that "[i]f the juvenile is under fourteen years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language the juvenile understands."[6] 8 C.F.R. 242.24(h). The form explains in bold-face type that the juvenile "ha[s] the right to be represented by a lawyer [and] a right to a hearing before a judge," and further explains that the juvenile "should ask for a hearing before a judge" "[i]f for any reason you do not want to go back to your country." See App., *infra*, 3a.

The form then requires the juvenile to indicate whether he wishes to challenge his deportability or accept voluntary departure. This election is made by checking one of two boxes, labeled in bold-face type, "I request a hearing before a judge" or "I do not want to have a hearing before a judge." App., *infra*,

[6] The instructions to Form I-770 require the officer to check boxes indicating whether the subject read the notice or the agent read the notice to the subject and, if so, in what language the notice was read. See App., *infra*, 1a. We note that the language of 242.24(h) refers to a form titled "Notice and Request for Disposition," which actually is the title of Form I-274 (discussed below). Notwithstanding this misnomer, the practice of INS under 242.24(h) is to offer all juveniles the Form I-770; the Form I-274 is offered only to those juveniles who indicate on the Form I-770 that they wish to accept voluntary departure. See Instructions to Form I-770, App., *infra*, 1a ("This advisal is required to be given to all persons who are taken into custody and who appear, are known, or claim to be under the age of eighteen and who are not accompanied by one of their natural or lawful parents.").

3a.[7] If the latter box is marked, the juvenile is furnished a Form I-274, which allows the juvenile formally to accept voluntary departure. See App., *infra*, 5a-6a.[8]

b. If the juvenile indicates that he does not wish to accept voluntary departure, his case automatically is reviewed by an examining officer within 24 hours of arrest. 8 C.F.R. 287.3. The examiner determines whether "there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws." If such evidence exists, INS then institutes deportation proceedings against the juvenile under 8 U.S.C. 1242(a) by issuing an order to show cause on Form I-221S, pursuant to 8 C.F.R. 242.1. See App., *infra*, 7a-8a (reprinting Form I-221S).

c. Once deportation proceedings have been instituted, the Attorney General enjoys broad discretion under Section 1252(a)(1) to determine whether (a) to continue custody of the alien, (b) to release the alien on bonds "containing such conditions as the Attorney General may prescribe," or (c) to release the alien on conditional parole. See *INS* v. *National*

[7] The box indicating that the juvenile does not request a hearing also contains the following statement: "I am in the United States illegally and ask that I be allowed to return to my country, which is named below." App., *infra*, 3a.

[8] This form, like the I-770, is available in English and Spanish versions. It requires the alien to check a box admitting deportability and waiving the "right to a hearing before an Immigration Judge." In addition, the form contains boxes on which it is indicated whether the form was read by the alien or read to the alien by the officer. See App., *infra*, 5a-6a.

Center for Immigrants' Rights, 112 S. Ct. 551, 558-559 (1991).[9] Pursuant to INS regulations, the detained alien must be advised that the decision concerning release will be made within 24 hours. 8 C.F.R. 287.3.

If INS determines to maintain custody, 8 C.F.R. 242.2[10] requires that additional disclosures be made to the alien concerning his rights, and provides an opportunity for a hearing before an immigration judge. Under this regulation, INS must advise the alien of his right to be represented by legal counsel of his choice (at no expense to the government); the basis for his arrest; the conditions under which his release has been authorized; and his right to request a hearing before an immigration judge. 8 C.F.R. 242.2(c)(2).[11] The regulation further establishes

[9] The statute provides:

> [A]ny * * * alien taken into custody [on the basis of deportability] may, in the discretion of the Attorney General and pending [the] final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.

[10] Part 242 of 8 C.F.R. applies to this stage of the proceedings against an alien arrested without a warrant under 8 U.S.C. 1357, because 8 C.F.R. 287.3 provides that, upon the determination by the examining officer that deportation proceedings should be instituted, "further action in the case shall be taken as provided in part 242 of this chapter."

[11] This notice is provided by means of Form I-221S, which advises the juvenile whether he will be detained pending the deportation hearing and explains that he "may request the Immigration Judge to redetermine this decision." See App., *infra*, 8a. Internal procedures provide that "[w]hen

that an alien may apply to an immigration judge "for release from custody or for amelioration of the conditions under which he or she may be released" at any time after deportation proceedings are commenced and before the deportation order becomes final. 8 C.F.R. 242.2(d). The judge's determination is subject to review in the Board of Immigration Appeals, 8 C.F.R. 242.2(d), 3.1(b)(7), and then by the federal courts, 8 U.S.C. 1252(a)(1).

2. In recent years INS has confronted a growing problem—a multitude of deportable juveniles without parents or other related adults. In 1990, for example, INS took custody of 8542 juveniles pending hearings on deportability. Although INS did not then maintain nationwide records as to the number of juveniles unaccompanied by related adults, records from the Southern Region (principally South Texas) show that 73% of the 1317 juveniles detained there in 1990 were unaccompanied.[12] INS thus has been

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personal delivery of an order to show cause is made by an immigration officer, the contents of the order to show cause shall be explained" and provide that "[i]f an interpreter is used for this purpose, the interpreter shall append the certification on the reverse of the order to show cause." *I & NS Investigator's Handbook* 5-3.11 (Aug. 31, 1981), App., *infra*, 9a. Furthermore, Section 545 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5062 (to be codified at 8 U.S.C. 1252b(a)(3)(A)), now requires that the form "shall be in English and Spanish."

[12] The University of Houston has conducted a statistical study of the 1259 juveniles (accompanied and unaccompanied) detained in 1989 in South Texas. See N. Rodriguez & X. Urrutia-Rojas, *Undocumented and Unaccompanied: A Mental-Health Study of Unaccompanied, Immigrant Children from Central America* (1990) [hereinafter *Undocumented Children Study*] (a copy has been lodged with the Court and

faced with a difficult problem: how to care for unaccompanied alien juveniles pending hearings on their deportability.

To deal with this problem, the Attorney General has exercised his authority to promulgate specific regulations governing the custody and release of alien juveniles arrested on deportation charges. 8 C.F.R. 242.24. Designed to "strik[e] a balance by providing a list of appropriate custodians while maintaining the discretion of the District Director or Chief Patrol Agent to release a juvenile to an adult other than those listed individuals in unusual and compelling circumstances," 53 Fed. Reg. 17,449 (1988), the regulations generally provide for release to those individuals historically recognized as appropriate guardians under state law: adult relatives or legal guardians.

a. First, these regulations *require* the release of juveniles, "in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention," unless INS determines that detention is necessary to ensure presence at the deportation hearing or to ensure the safety of the juvenile or others. 8 C.F.R. 242.24(b)(1). Second, if none of these individuals can be located other than in INS's custody, INS will evaluate simultaneous release of the juvenile and the adult "on a discretionary case-by-case basis." 8 C.F.R. 242.24(b)(2). Third, if the parents or legal guardians are unavailable to as-

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furnished to respondents). Of these juveniles, about 35% were from El Salvador, 18% from Guatemala, 17% from Honduras, and 30% from Nicaragua. See *id.* table 2. The juveniles' ages were as follows: 37% were 17 years old; 32% were 16 years old; 17% were 15 years old, and 14% were 14 or younger. See *id.* table 3.

sume custody because they are outside the United States or in INS detention, "the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit." 8 C.F.R. 242.24(b)(3).

If none of these procedures leads to release, INS "[i]n unusual and compelling circumstances and in the discretion of the district director or chief patrol agent" may release the juvenile to some other adult. 8 C.F.R. 242.24(b)(4). An unrelated adult cannot obtain custody, however, unless he "executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings." 8 C.F.R. 242.24(b)(3) and (4). INS specifically rejected the suggestion of several parties that the list of custodians to whom release routinely would be made be expanded to include "any responsible adult" because "[r]elease to others beyond [a parent, legal guardian, or adult relative] on a routine basis, would require the performance of home studies for which the Service is neither adequately funded nor qualified." 53 Fed. Reg. 17,449 (1988).[13]

b. If the juvenile is not released immediately under 8 C.F.R. 242.24(d), he does not remain in a correctional institution. Instead, INS must make "suitable placement of the juvenile in a facility designated for the occupancy of juveniles." 8 C.F.R. 242.24(c).[14]

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[13] Pursuant to current policy, however, INS will release a child under the "unusual circumstances" clause to a state-licensed child-care facility. See National Policy, App., *infra*, 12a.

[14] Until suitable placement is found, the juvenile "may be temporarily held * * * in any INS detention facility having separate accommodations for juveniles," 8 C.F.R. 242.24(d), where the juvenile will be housed apart from unrelated adults.

Pursuant to an agreement reached at an earlier stage of this litigation, INS must within 72 hours place the juvenile in a facility that meets or exceeds the detailed standards established by the Alien Minors Shelter Care Program of the Community Relations Service, Department of Justice, 52 Fed. Reg. 15,569-15,573 (1987) [hereinafter *CRS Standards*] (*reprinted in* Pet. App. 152a-167a). See Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, No. 85-4544-RJK (Px) (C.D. Cal. Nov. 30, 1987) [hereinafter *Child Care Memorandum*], Pet. App. 148a-205a.[15]

The program is designed "to establish a network of community based shelter care programs" that will "provide a safe and appropriate environment for alien minors" during the pendency of administrative proceedings. *CRS Standards*, Pet. App. 170a. Organizations seeking to provide care under the program can provide services "through either residential, foster or group care programs," *id.* at 177a, but must meet "state licensing requirements for the provisions of shelter care, foster care, group care and related services to dependent children." *id.* at 176a.

The programs must provide not only physical custody, but family reunification services, routine and emergency medical care, comprehensive needs assess-

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[15] As we explained in our petition and in our Reply Brief at the petition stage, INS generally has adhered to the policies set forth in the Child Care Memorandum on a nationwide basis, even though the agreement by its terms applied only to INS's Western Region. See Pet. 7 n.8; Reply Br. 2-3. Since the petition was filed, INS has promulgated a national policy, see App., *infra*, 10a-14a, which in all important respects formalizes this practice on a nationwide basis. See Reply Br. 2-3.

ment,[16] recreation,[17] access to religious services, and legal assistance. See *CRS Standards*, Pet. App. 159a; *Child Care Memorandum*, Pet. App. 181a-182a. The organization providing the care must "develop an appropriate individualized service plan for the care and maintenance of each minor in accordance with his/her needs as determined in an intake assessment." *CRS Standards*, Pet. App. 157a. The providing organization also must "implement and administer a case management system which tracks and monitors [the child's] progress on a regular basis to ensure that each child receives the full range of program services in an integrated and comprehensive man-

[16] In light of the conditions in the countries from which these children come, and the frequent traumatic circumstances of their travel to this country, one researcher has concluded that "at least 50% of the children" have "clinically significant levels" of Post-Traumatic Stress Disorder. See *Undocumented Children Study*, note 12, *supra*, at 58-59. If the study's conclusions are accurate, it is particularly important that the program provide comprehensive and professional care. Thus, not only are providers of the care informed that they "should schedule at least one (1) individual counseling session per week conducted by trained social work staff," *Child Care Memorandum*, Pet. App. 181a, but they also are informed that they "should anticipate many 'emergency' individual counseling sessions," *id.* at 182a.

[17] The recreation plan must include "at least one hour per day of large muscle activity and one hour of structured leisure-time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days school is not in session." *Child Care Memorandum*, Pet. App. 183a. The facilities must include a recreation area with a "variety of fixed and movable equipment * * *. Examples of the variety of equipment that should be available include a basketball, volleyball, softball, tetherball, punching bag and soccer ball." *Ibid.*

ner." *Ibid.* The organization's task should be "accomplished in a manner which is sensitive to culture, native language and the complex needs of these minors." *Ibid.* Finally, the facilities are to be operated "in an open type of setting without a need for extraordinary security measures." *Child Care Memorandum*, Pet. App. 173a.

The program must include education "provided by a teacher certified by the State Department of Education," which must "concentrat[e] primarily on the development of basic academic competencies" [18] and occur "in a structured classroom setting, Monday through Friday." *Child Care Memorandum*, Pet. App. 182a-183a. The facilities are required to "provide minors educational and other reading materials in Spanish," and INS officials are to "make reasonable efforts to provide minors reading materials and educational instruction in other languages as needed." *Id.* at 149a.[19]

3. Respondents filed this class action in 1985, claiming that INS practices with respect to detained children violate the Constitution and applicable pro-

[18] The basic academic areas "should include Science, Social Studies, Math, Reading, Writing and Physical Education." *Child Care Memorandum*, Pet. App. 182a.

[19] The total time period in INS-supervised custody is quite short for the great majority of the juveniles. For example, of the 199 juveniles released from INS custody in November 1991 (the last month before the petition was filed), 82% (164) had been in INS custody for less than 30 days; see also *Child Care Memorandum*, Pet. App. 178a ("[t]he length of care per child is anticipated to be approximately thirty (30) days"). Because some juveniles do remain for longer periods, the *Child Care Memorandum* requires care providers to "design programs which are able to provide a combination of short term and long term care." *Ibid.*

visions of the immigration laws. The district court certified a class of all alien juveniles detained by INS in its Western Region due to the absence of a parent or guardian. J.A. 28a-30a. After discovery, the district court granted respondents' motion for summary judgment, stating only that the ruling was based "on due process grounds" (Pet. App. 146a), and entered a permanent injunction. The order included three provisions central to this case.

First, the court invalidated the INS policy that limits release of children to unrelated adults, by requiring INS to "release any minor otherwise eligible for release on bond or recognizance to his parents, guardian, custodian, conservator, *or other responsible adult party.*" Pet. App. 146a (emphasis added). Second, the court barred INS from continuing its practice of requiring persons to whom it releases children to agree that they would care for the children, but authorized INS only to "require from such persons a written promise to bring such minor before the appropriate officer or court." *Ibid.* Third, the order invalidated the INS regulations regarding review of the detention, which provide for an automatic initial examination under 8 C.F.R. 287.3, followed by a hearing before an immigration judge under 8 C.F.R. 242.2(d) upon request. The court instead decreed: "Any minor taken into custody shall be forthwith afforded an administrative hearing to determine probable cause for his arrest and the need for any restrictions upon his release. Such hearing shall be held with or without a request by or on behalf of the minor." Pet. App. 146a.

4. A divided panel of the court of appeals reversed. Pet. App. 70a-144a. Writing for two members of the panel, Chief Judge Wallace first rejected

respondents' claim that the child release policy established by 8 C.F.R. 242.24 transgressed the Attorney General's broad authority to detain arrested aliens pending deportation proceedings pursuant to 8 U.S.C. 1252(a)(1). Pet. App. 80a-93a. The majority also rejected respondents' constitutional claims.

The panel rejected respondents' substantive due process claim because the INS policies at issue were rationally related to legitimate ends of the government, such as fostering the welfare and safety of the children, Pet. App. 107a-109a. The panel concluded that a more demanding level of scrutiny was not required because the only right at stake—"the right to be released to an unrelated adult,"—could not be characterized as a "fundamental right." *Id.* at 102a-107a. The panel majority also rejected respondents' procedural due process claim and reversed the district court order requiring INS to hold mandatory hearings. *Id.* at 111a-117a. Judge Fletcher dissented. She did not question Chief Judge Wallace's statutory analysis, but concluded that INS regulations violated due process. *Id.* at 118a-144a.

5. Upon rehearing en banc, the court of appeals reversed by a 7-4 vote.[20] The court's opinion, like the panel dissent, did not dispute that the regulations were authorized by Congress. The court nevertheless concluded that they were unconstitutional. Pet. App. 1a-69a.

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[20] Pursuant to Ninth Cir. R. 35-3, the en banc rehearing took place not before the full court of appeals (with 28 active judges), but before a panel consisting of the Chief Judge and 10 additional judges drawn by lot from the active judges of the court. The Ninth Circuit has not conducted a full en banc proceeding since this local rule was issued in 1980. See Arthur D. Hellman, *Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* 69-70 (1990).

Judge Schroeder wrote for six members of the majority (Pet. App. 1a-25a). With respect to respondents' substantive claim, the court concluded "aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest." The court explained that this right was "secured by the Constitution in its enumerated guarantee of habeas corpus." *Id.* at 16a. Turning to the government purposes involved (*id.* at 19a-24a), the majority rebuffed INS's proffered concern for the welfare of children released to unrelated adults. First, the court reasoned that INS has no expertise in child welfare, and its decisions "in this area" are therefore "not entitled to any deference." *Id.* at 20a. Then, examining the agency's proffered concern for child welfare without deference, the court noted INS's reasoning that "since it is unable to do [an appropriate] evaluation [of proposed custodians], the best interests of the child must lie in detention rather than in release" to unrelated adults, but stated without further explanation that "[t]he Constitution requires the opposite conclusion." *Id.* at 21a. Accordingly, the court held that "INS may not determine that detention serves the best interests of [respondents] in the absence of affirmative evidence that release would place the particular child in danger of some harm." *Ibid.*

The court also accepted respondents' procedural due process claim. Judge Schroeder explained that the substantive decision discussed above—which "requires that the decision to detain be made only in conjunction with a neutral and detached determination of necessity," Pet. App. 24a—required affirmance of the procedural requirements imposed by the

district court. *Id.* at 24a-25a. The court stated that the existing procedures for a hearing before an immigration judge (see 8 C.F.R. 242.2(d)) were adequate except that (i) a hearing must be held automatically, without regard to a child's request; and (ii) the hearing must include an inquiry into whether any available unrelated adult seeking custody would represent a danger to the child. Pet. App. 25a.[21]

Chief Judge Wallace dissented, joined by Judges Wiggins, Brunetti, and Leavy. The dissent criticized the en banc majority for reasons similar to the analysis set forth in Chief Judge Wallace's original panel opinion. Pet. App. 52a-69a.

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[21] Judges Tang (Pet. App. 26a-37a) and Norris (*id.* at 37a-41a) concurred, arguing that the INS's practices do not comply with the Due Process Clause. The seventh member of the en banc majority, Judge Rymer, concurred in part and dissented in part. Pet. App. 41a-52a. Declining to address the substantive constitutional arguments, she would have affirmed portions of the district court's judgment on procedural due process grounds based on her view that the Due Process Clause requires a prompt hearing before a neutral officer. She did not adopt the majority's substantive holding that INS must make an affirmative showing of likelihood of harm to the child, but instead held simply that INS should conduct a hearing to determine whether release was appropriate under the "unusual and compelling circumstances" standard identified in the existing regulation, 8 C.F.R. 242.24 (b) (4).

SUMMARY OF ARGUMENT

1. The Due Process Clause of the Fifth Amendment does not require the federal government to release unaccompanied alien juveniles to unrelated adults. Although the Court has held that the Clause has a substantive component that proscribes conduct that interferes with rights implicit in the concept of ordered liberty, that component cannot plausibly be extended to encompass a general right that would force the federal government to release juvenile aliens to unrelated adults. The customs and traditions of our Nation recognize the government's power—if not the obligation—to care for juveniles in the absence of their parents or guardians. Accordingly—even if we put to one side the federal government's plenary control over aliens—the Due Process Clause cannot be construed to impose an implied obligation that the government release juveniles to unrelated adults unwilling or unable to take the steps necessary to become guardians in accordance with readily available state-law procedures.

Similarly, the government's decision to detain the juveniles complies with the two-step analysis set forth by this Court in *Schall* v. *Martin*, 467 U.S. 253 (1984), and *United States* v. *Salerno*, 481 U.S. 739 (1987), establishing the conditions under which nonpunitive detention of citizens is permissible. First, the detention furthers the government's interest in ensuring the welfare of the juveniles in its custody, which is a legitimate purpose for retaining custody consistent with fundamental fairness required by the Due Process Clause. See *Schall*, 467 U.S. at 265-268. This purpose would justify retaining custody even of juveniles who are citizens; the limited judicial inquiry appropriate in cases involving the exercise by

the political Branches of the immigration power makes it all the more clear that the detention serves a constitutionally acceptable purpose. Second, the conditions of detention are consistent with this purpose and do not suggest that detention is actually punitive in purpose. Accordingly, the detention does not deprive respondents of due process.

The court of appeals erred seriously in determining that INS's approach to this problem was "not entitled to any deference," Pet. App. 20a. Even outside the immigration context, it is well established that federal judges should not employ constitutional adjudication under the Due Process Clause as an excuse to substitute their policy judgments for the policy judgments of actors in the political Branches. The court of appeals' view that this approach was required by this Court's decision in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976), is simply incorrect. *Hampton* involved a regulation that would have been unconstitutional unless it was enacted pursuant to the federal government's power over immigration and naturalization. Because it was enacted by the Civil Service Commission, without the approval of Congress, the President, or the Executive Branch agencies that implement immigration policy, the Court declined to assume the regulation represented an exercise of immigration policy. This case, by contrast, involves a policy judgment regarding aliens, by the agency duly authorized to implement policies with respect to aliens. *Hampton* is inapposite.

2. The court of appeals also erred in concluding that INS procedures do not provide due process. There is no reason to require a hearing to determine whether there is particularized evidence that adults willing to assume custody pose a risk of harm to the

juveniles, because that fact is not relevant to the agency's custody determination. As shown above, the Constitution permits the agency to enact a general substantive policy preventing release to persons other than related adults and legal guardians. Because under this rule the existence of a particularized risk is not relevant, the Due Process Clause does not require a hearing to establish whether the risk exists.

Similarly, there is no need to require automatic hearings regarding custody in the absence of a request by the juvenile. INS procedures clearly inform the juveniles of their right to a hearing and ensure that they contact responsible adults before making their decisions. If a juvenile armed with the relevant information indicates that he does not wish to have a hearing, the Due Process Clause does not require the government to provide one.

At bottom, this case turns on the court of appeals' view that INS erred in determining that juveniles are better off in government-monitored child-care facilities, specially designed to deal with the complex needs of unaccompanied alien juveniles, than they are in the custody of unrelated adults whose interest in the juveniles is insufficient to motivate them to take advantage of state-law proceedings necessary to establish status—and responsibility—as guardians. In our constitutional system, that determination is left to the political Branches, not the judicial Branch. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT REQUIRE THE FEDERAL GOVERNMENT TO RELEASE UNACCOMPANIED ALIEN JUVENILES TO UNRELATED ADULTS

The opinion of the court of appeals does not expressly rely on the Due Process Clause,[22] rendering it difficult to respond precisely to its analysis. In our view, though, respondents' claim fails because the Due Process Clause contains no general substantive requirement that the federal government release juvenile aliens to unrelated adults, and because the circumstances establish that a facially legitimate and nonpunitive purpose supports the detention.

A. The Due Process Clause of the Fifth Amendment Does Not Protect a Substantive Right of Alien Juveniles To Be Released to Unrelated Adults

This Court has stated on several occasions that the Due Process Clauses of the Fifth and Fourteenth Amendments contain a "substantive component * * * that protects individual liberty against 'certain government actions regardless of the fairness of the pro-

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[22] The only constitutional provision on which the en banc majority relied expressly (see Pet. App. 16a) was the Habeas Corpus Clause, Art. I, § 9, Cl. 2. That Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Clause is not an independent fount of substantive constitutional rights; rather, it merely requires a procedure to test whether government detentions violate *other* substantive provisions of law. The very pendency of this lawsuit demonstrates conclusively that the Privilege itself has not been suspended; the issue before this Court is whether some other provision of the Constitution bars the detention at issue.

cedures used to implement them.'" *Collins* v. *City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992) (quoting *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986)).[23] The Court has explained that the proscribed actions are those that "interfer[e] with rights implicit in the concept of ordered liberty." *United States* v. *Salerno*, 481 U.S. 739, 746 (1987) (citations and internal quotation marks omitted). At the same time, this Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this area are scarce and open-ended." *Collins*, 112 S. Ct. at 1068.

The limited reach of substantive due process makes it clear that the Clause does not protect a substantive right to be released to an unrelated adult, particularly when the person claiming the right is an alien.[24] To be sure, this Court has recognized a "private realm of family life into which the state cannot enter," *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944), and has held that this realm is sufficiently broad to prevent the States from "mak[ing]

[23] Although most of the cases in this area have dealt with the Due Process Clause of the Fourteenth Amendment, the Court has suggested that the same analysis applies to cases arising under the Fifth Amendment. See *Bowers* v. *Hardwick*, 478 U.S. 186, 191 (1986) (describing substantive due process cases as interpretations of the "Due Process Clauses of the Fifth and Fourteenth Amendments").

[24] See, *e.g.*, *Galvan* v. *Press*, 347 U.S. 522, 530-531 (1954) (per Frankfurter, J.) (rejecting the view that the "concept of substantive due process * * * qualifies the scope of political discretion * * * in regulating the entry and deportation of aliens," and stating that "the Executive Branch of the Government must respect the *procedural* safeguards of due process" (emphasis added)).

a crime of a grandmother's choice to live with her grandson," *Moore* v. *City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion of Powell, J.). But these cases rest squarely on "the sancity of the family" and the indisputable fact that "the institution of the family is deeply rooted in this Nation's history and tradition," *id.* at 503. The plurality in *Moore* made it clear that a similar ordinance would be permissible if it "affected only *unrelated* individuals." *Id.* at 498 (emphasis in original) (citing *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974)). These decisions therefore lend no support to a constitutional rule recognizing a substantive due process right to live with unrelated persons.

Moreover, "this Nation's history and tradition" (*Moore*, 431 U.S. at 503) provide strong support for the INS's policies regarding the welfare of these alien minors. As this Court recognized in *Schall* v. *Martin*, 467 U.S. 253, 265 (1984), juveniles "are assumed to be subject to the control of * * * the State" when "parental control falters." Consistent with this responsibility, the government has determined that juveniles should not ordinarily be released to the care of unrelated adults who are unwilling to take the steps necessary to become legal guardians under state law. It is untenable to suggest that this conduct offends "the concept of ordered liberty," *Salerno*, 481 U.S. at 746.

B. The Government's Interest in Ensuring the Welfare of Alien Juveniles in Its Custody Is a Facially Legitimate and Nonpunitive Purpose That Justifies Retaining Custody of the Juveniles

Although the Due Process Clause does not protect a substantive right of juveniles to be released to unrelated adults, it does prohibit deprivations of "liberty" without "due process of law," and thus bars

the government from detaining individuals for punitive purposes in the absence of a trial, and allows detention in other contexts only to "serv[e] a legitimate regulatory purpose compatible with the fundamental fairness demanded by the Due Process Clause." See *Salerno*, 481 U.S. at 746-747; *Schall*, 467 U.S. at 268-270. Because this case presents an exercise of the discretion Congress has delegated to the Executive in "regulating the relationship between the United States and our alien visitors," *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976), the "special judicial deference" appropriate for policy choices in the immigration context, see *Fiallo* v. *Bell*, 430 U.S. 787, 793 (1977), suggests that any "facially legitimate and bona fide reason" should be sufficient, because "the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification" against the constitutionally protected interests of those adversely affected. *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972) (discussing a First Amendment claim).[25]

[25] Respondents suggest that the "plenary authority" of the political Branches with respect to immigration policy has force only in cases "involving whom to admit or exclude from the United States," and that the "method implementing [a] substantive immigration enactment [is] subject to searching review." Br. in Opp. 17 (citing *INS* v. *Chadha*, 462 U.S. 919, 940-941 (1983); *Landon* v. *Plasencia*, 459 U.S. 21, 32-37 (1982)). Neither point is correct. First, this Court's opinion in *Kleindienst* clearly establishes that the "special judicial deference" appropriate in the immigration context applies not only to Congressional policy choices, but also to the Executive's exercise of delegated power. See *Kleindienst*, 408 U.S. at 770.

Nor do this Court's decisions support the limited scope of plenary authority suggested by respondents. As the Court explained in *Diaz* (which involved a decision regarding eligibility for welfare benefits of aliens already lawfully admitted, see 426 U.S. at 69), the special deference appropriate in immigration matters is tied to "the responsibility for regulating the relationship between the United States and our alien visitors," a responsibility "committed to the political branches of the Federal Government." 426 U.S. at 81. Because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," and because in our society the responsibility for formulating those policies is "exclusively entrusted to the political branches of government," it makes perfect sense to say that all such policy choices should "be largely immune from judicial inquiry or interference," *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); see *Diaz*, 426 U.S. at 81 ("Since decisions in these matters may implicate our relations with foreign powers, * * * such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.").

Indeed, the broad field in which this deference applies is evident from *Plasencia* itself, a case rejecting a procedural due process claim to the procedures afforded by the INS in an exclusion hearing. Even in that purely procedural context, the Court noted that "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature." 459 U.S. at 34.

[26] The *Salerno* Court offered a catalogue (see 481 U.S. at 748-749) of numerous instances in which this Court has found that government interests were sufficient to outweigh an individual's liberty interest.

1. *The Government's Interest in the Welfare of Alien Juveniles in Its Custody Is a Legitimate Regulatory Purpose That Justifies Retention of Custody*

Under *Schall* v. *Martin*, the first step in determining whether the government lawfully may detain citizens in a pretrial context is to determine whether the "practice serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause." 467 U.S. at 268.[26] The

INS reasonably determined that the custody in issue does further a legitimate regulatory purpose and that determination is entitled to judicial deference.

a. The INS retains temporary custody of unaccompanied minors for the purpose of fostering their welfare and safety until INS can locate a related adult (or legal guardian) or conclude the deportation proceedings.[27] This Court already has held, in *Schall*, that child welfare is a legitimate justification for pretrial custody. As the Court explained in *Schall*, the inability of juveniles to care for themselves makes it perfectly consistent with fundamental fairness to detain juveniles to further this purpose:

> [J]uveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.

467 U.S. at 265 (citations and internal quotation marks omitted); see *Santosky* v. *Kramer*, 455 U.S. 745, 766-767 (1982) (disscusing the State's *parens patriae* interest in child welfare).

In *Schall*, the Court rejected a Due Process Clause challenge to pretrial detention of juveniles because

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[27] The *CRS Standards* published in the Federal Register make clear that concern for the welfare of minors (including family reunification) was the primary purpose for implementing this program. See Pet. App. 156a-157a ("Purpose and Scope" section), 159a, 185a-186a.

the government had determined that it was necessary to protect society from crime and to protect the child from the consequences of his inability to care for himself. There is no basis for reaching a different conclusion here.

Although INS does not contend that unaccompanied minors present a danger to the community, the *Schall* Court plainly accepted the legitimacy of governmental interests in retaining custody of children to care for them when parental control falters. See *Schall*, 467 U.S. at 265-266. The government's interest in protecting the child from harm is scarcely any less compelling than its interest in preventing the child from harming others. See also *Bellotti* v. *Baird*, 443 U.S. 622, 635 (1979) (plurality opinion of Powell, J.) (noting that constitutional guarantees are applied flexibly in cases involving children, to allow the government "to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'") (ellipses in *Bellotti* opinion) (quoting *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion of Blackmun, J.)).

b. INS determined that the most appropriate means for furthering its interest in the welfare and safety of unaccompanied minors was to house the minors in government-supervised child-care facilities until a parent or guardian could be located. For a variety of administrative reasons, INS determined that it would not be appropriate to safeguard the complex needs of these juveniles by conducting temporary guardianship hearings itself. The primary reason for this is straightforward and reasonable: INS has neither the administrative resources nor the expertise to conduct the home visits necessary to make reliable

guardianship determinations. In recognition of the States' traditional role in resolving guardianship issues,[28] INS adopted a policy of declining to release a child to an unrelated adult unless the adult has been appointed by the State to act as guardian. Although the Constitution would *permit* the federal government to make the policy choice to supplant state-court determinations on these issues (a policy choice Congress has made in the limited context described in 18 U.S.C. 5034, see note 30, *infra*), it cannot possibly *require* that choice. Cf. *Gregory* v. *Ashcroft*, 111 S. Ct. 2395, 2399-2403 (1991) (discussing the important role the States play in our federal system).

The court of appeals, though, readily concluded that this policy choice did not represent a permissible accommodation of the juveniles' interests (Pet. App. 20a-21a), relying squarely on its view that INS's policy choices in dealing with the problem of detained alien juveniles "are not entitled to any deference," *id.* at 20a. The court's overt willingness to substitute its policy judgment for the policy judgments of the political Branches cannot be squared with this Court's teaching, even outside the immigration context, that "federal judges—who have no constituency —have a duty to respect legitimate policy choices made by those who do," *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

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[28] The States, of course, have carefully developed procedures for determining the qualifications of unrelated adults to care for children. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 14-5201 to 14-5212, 14-5401 to 14-5432 (1975 & Supp. 1991); Cal. Prob. Code §§ 1510-1517 (West 1991).

The apparent basis[29] for this novel approach to constitutional adjudication was the court of appeals' understanding of this Court's decision in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976). In the court of appeals' view, *Hampton* justifies the conclusion that a court evaluating the constitutionality of a government policy is not required to give any weight to policy choices made by the political Branches if the court determines that the policy was made by an entity without expertise in the particular area. See Pet. App. 20a ("Child welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference.").

This reading of *Hampton* is seriously flawed. In *Hampton*, this Court considered a Civil Service Com-

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[29] The court also attempted to support this view by arguing that this Court's decision in *In re Gault*, 387 U.S. 1 (1967), constituted a "ruling * * * that children should be treated in a manner least restrictive of liberty." Pet. App. 20a. The court's reliance on *Gault* as support for a least-restrictive-alternative test in this context is mystifying. First, the opinion in Gault is expressly limited to juvenile rights at the trial stage ("[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process."). Second, the various holdings of *Gault* do not support a least-restrictive-alternative analysis, but rather stand for the general proposition that juveniles are entitled to at least some of the procedural protections set forth in the Bill of Rights. See 387 U.S. at 31-57 (holding that juveniles are entitled to precise notice of charges against them, the right to counsel, the right to confront witnesses, and protections against self-incrimination). Finally, this Court in *Schall* considered in a much more apposite context the proper mode of analyzing government efforts to detain juveniles; it makes no sense to rely on generalized inferences from *Gault* when the *Schall* Court considered the precise area at issue in this case.

mission regulation limiting federal government employment of aliens, which would have been constitutional only if enacted pursuant to the plenary federal power over immigration and naturalization. Compare *Sugarman* v. *Dougall*, 413 U.S. 634 (1973) (invalidating a New York statute limiting government employment of aliens). Accordingly, in this unique context, the Court concluded that "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." 426 U.S. at 103. Because the regulation was approved neither by the Congress or the President, and because the sole business of the Civil Service Commission is to "promote the efficiency of the federal civil service," *id.* at 114, the Court was unwilling to assume that the regulation was promulgated in furtherance of the federal immigration power. The Court explained that the aliens harmed by the regulation "were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States," and that accordingly a decision to limit their liberty while here must "be made either at a comparable level of government or * * * justified by reasons which are properly the concern of [the Civil Service Commission]." *Id.* at 116.

In this case, by contrast, the decision to detain these aliens has been made by the agency in the Executive Branch responsible for day-to-day implementation of policies with respect to aliens.[30] It is untenable to

[30] Both the court of appeals (Pet. App. 21a) and respondents (Br. in Opp. 17) suggest that INS's decision to detain alien juveniles rather than release them to unrelated adults conflicts with Congressional policy regarding aliens, as set forth in 18 U.S.C. 5034 and related provisions. Section 5034, though, simply provides that federal magistrates adjudicating criminal cases involving juveniles generally should release the juveniles to related adults or to other responsible parties. That section, directed at criminal proceedings involving juveniles who are citizens of this country, is plainly inapplicable to this dispute, which involves civil deportation proceedings and alien juveniles. Congress has not adopted any similar policy with respect to deportation proceedings or alien juveniles, and has not afforded INS the resources necessary to evaluate on a case-by-case basis the ability of willing adults to provide the care that is appropriate for juveniles in this case, whose troubled backgrounds, see note 16, *supra*, and lack of familiarity with our culture make special care extraordinarily important. It is entirely reasonable for INS instead to defer to guardianship determinations made by the family courts of the States. In any event, we note that the conditions of detention established by INS more than satisfy the statutory provisions Congress provided for the detention of citizen juveniles in 18 U.S.C. 5035, 5039.

suggest that INS's policy choice is not entitled to deference because INS in some sense is an interloper into the juvenile-welfare field. INS has not gone searching outside its proper jurisdiction for this problem. The problem has been thrust upon INS by the combination of socioeconomic conditions in Central America beyond its control—which cause huge numbers of unaccompanied alien juveniles to flee their homelands—and INS's statutory obligation to arrest aliens unlawfully in the country. INS is the only federal agency with responsibility for caring for these juveniles. Accordingly, its resolution of those policy questions is entitled to the same deference federal courts customarily grant when they consider constitutional challenges to Executive Branch policy choices. As discussed above, in the immigration context, those policy choices are "of a political character and therefore subject only to narrow judicial review," *Hamp-*

ton, 426 U.S. at 101 n.21. The court of appeals' contrary view—that it is appropriate to grant "no deference"—is wrong as a matter of law.

2. The conditions of confinement are consistent with the nonpunitive interest in furthering juvenile welfare.

Under the framework set forth in *Schall* and applied in *Salerno*, the second step in determining whether the government may detain individuals in a pretrial context is to consider the conditions of custody; the question is whether those conditions are sufficiently compatible with the articulated purpose of custody to justify the conclusion that the government's decision to retain custody actually rested on that purpose, rather than an unstated desire to inflict punishment before conviction. *Schall*, 467 U.S. at 269-274; *Salerno*, 481 U.S. at 746-748. The terms and conditions of the custody at issue in this case clearly satisfy this inquiry. As discussed above, see pages 11-13, *supra*, the Community Relations Service has implemented a detailed program designed to further every significant aspect of the child's welfare.[31]

[31] Respondents make much (Br. in Opp. 9-15) of the unsatisfactory conditions alleged to have existed in INS facilities at earlier stages of this litigation. As we explained in our Reply Brief at the petition stage (see Reply Br. 3-4), respondents' allegations of deplorable conditions are no longer relevant, because INS entered into the consent decree described above, which sets forth detailed and comprehensive requirements regarding the conditions of detention. See *Child Care Memorandum*, Pet. App. 148a-205a. The issue in this case, rather, is whether, in light of the conditions required by that decree, the Constitution nevertheless prohibits INS from declining to release an alien juvenile to an unrelated adult who has not taken the trouble to become a legal guardian, unless INS can produce affirmative evidence of the likelihood that the adult would harm the juvenile.

The program compares favorably with the program outlined in *Schall*, 467 U.S. at 270-271. INS has developed this program to implement the articulated concern for the safety and welfare of detained alien juveniles (see note 27, *supra*), and the court of appeals agreed that INS's policy does not reflect an intent to punish the detained juveniles, Pet. App. 19a ("Whatever purposes detention serves, they do not relate to punishment."). Accordingly, the program is constitutional under the test outlined in *Schall* and *Salerno*.

II. THE EXISTING PROCEDURES PROVIDE THE PROCESS THAT IS DUE UNDER THE FIFTH AMENDMENT.

The court of appeals also ruled that the procedures afforded the detained juveniles must be altered in two respects in order to provide due process: (1) the hearing before the immigration judge to review INS's determination that detention is appropriate must include an inquiry into whether any available unrelated adult would represent a danger to the child; and (2) the hearing must be held automatically, even if the juvenile does not request it. See Pet. App. 25a. That ruling is incorrect. To the contrary, the existing procedures established by INS would provide the requisite process under the Fifth Amendment even if respondents were citizens.

1. As described above (pages 3-8, *supra*), an alien arrested pursuant to 8 U.S.C. 1357(a)(2) must "be taken without unnecessary delay for examination before an officer of the [Immigration and Naturalization] Service" to be examined as to his right to enter or remain in the country. INS regulations require that the proceedings take place "promptly, and in

any event within 24 hours," 8 C.F.R. 287.3, unless the individual seeks and is granted voluntary departure from this country. See 8 C.F.R. 242.5, 242.24(g). Before the juvenile makes any choices about his custody, with rare exceptions[32] he "must in fact communicate with either a parent, adult relative, friend, or with an organization found on the free legal services list." 8 C.F.R. 242.24(g).

If the juvenile does not seek voluntary departure, the government at the examining hearing must establish a prima facie case of deportability, thus meeting a standard even higher than the probable cause standard required to justify detention of pretrial detainees in criminal proceedings. See *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975). The juvenile is advised specifically in a language he understands (see 8 C.F.R. 242.24(h)) of the right to seek a hearing before an immigration judge under 8 C.F.R. 242.2(d), at which the juvenile may seek "release from custody or * * * amelioration of the conditions under which he or she may be released." The juvenile will receive such a hearing unless he declines to check a box marked "[I] do request a redetermination by an Immigration Judge of the custody decision." See App., *infra*, 8a (reprinting Form I-221S).

2. The court of appeals' first requirement—that the hearing include an inquiry into whether any unrelated adult willing to accept custody of the juvenile poses an affirmative risk of harm to the juvenile—rests on a misunderstanding of the substantive decision to be made. As we have shown in Point I, the Constitution permits the federal government, as a general matter, to decline to release alien juveniles

[32] The rules for Mexican and Canadian juveniles are slightly different. See note 4, *supra*.

in its custody to unrelated adults, based on the policy judgment that it is generally inappropriate for juveniles to be placed in the care of unrelated adults unless those adults are willing to accept the responsibility of becoming guardians of the juveniles.

Accordingly, the only relevant facts necessary to justify the detention are that the individuals are alien juveniles, and that there are no related adults or legal guardians available to accept custody. Because 8 C.F.R. 242.24(b) requires INS to determine these facts before detaining the juvenile, and because the hearing provided under 8 C.F.R. 287.3 allows the immigration judge to review INS's determination of these facts, no further factfinding is appropriate. In short, there is no basis for a hearing to determine whether the government could prove a particularized risk from release in each case, because the existence of a particularized risk is irrelevant to the required determination. See *Michael H.* v. *Gerald D.*, 491 U.S. 110, 126 (1989) (plurality opinion of Scalia, J.) ("It is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration."); *id.* at 132-133 (Stevens, J., concurring) (agreeing with this proposition).

The court of appeals erred in relying heavily on *Schall* v. *Martin*, *supra*, for its proposition that an individualized hearing is required in each case. The State justified detention in *Schall* by reference to the likelihood that the juvenile was reasonably likely to commit crimes that would harm others or the child. To satisfy that justification, the process had to be designed to detain only those children reasonably likely to commit crimes. Thus, the Constitution required hearings to determine whether the children

were reasonably likely to commit crimes. By contrast, detention is justified here by the absence of related adults to whom the child may be released. As discussed above, INS procedures require it to make that factual determination in order to retain custody of the minor and afford an opportunity for a hearing before an immigration judge to review that finding if the juvenile believes INS has erred.

3. The court of appeals' second requirement—that INS automatically hold redetermination hearings under 8 C.F.R. 287.3, even if the juvenile does not request such a hearing—is equally inappropriate. As discussed above, the regulations put the juvenile in contact with a responsible adult who is not affiliated with the government. The regulations entitle the juvenile to a full administrative hearing before an immigration judge at any time if he wishes to challenge the government's decision to retain custody. Moreover, the juvenile can choose to forego such a hearing only by declining to check a box that expressly states: "[I] do request a redetermination by an Immigration Judge of the custody decision." See App., *infra*, 8a (reprinting Form I-221S). These procedures are constitutionally satisfactory.

In light of this Court's holding that a juvenile has the capacity to waive his *Miranda* rights in criminal proceedings, see *Fare* v. *Michael C.*, 442 U.S. 707, 726-727 (1979), it also must be true that a juvenile can waive the much less significant right to a redetermination of his custody status in a deportation proceeding. A deportation proceeding "is a purely civil action to determine eligibility to remain in this country," *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); see also *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.27 (1975) (suggesting that its holding would not

apply in civil cases because it was limited to the "wholly different context of the criminal justice system").

Moreover, the balance of interests readily supports the INS's conclusion that a second mandatory hearing is not necessary in every case. The "private interest at stake," see *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)—whether the juvenile will be detained pending the deportation proceedings—does bear some significance, and this interest is weighty. On the other hand, the "risk of an erroneous deprivation," see *ibid.*, is quite small in these circumstances. The juvenile has an unconstrained right to a hearing on request, and the limited facts on which the detention properly can rest—whether the alien is a juvenile, whether there are any related adults or legal guardians available to take custody, and whether the alien appears to be in this country lawfully—can be determined reliably without a full-blown adversarial hearing. Finally, the "fiscal and administrative burdens," see *ibid.*, of having a hearing even when the alien has not requested it—however clear and undisputed the facts may be—are substantial. In these circumstances, INS provides all the process that is due when it puts the juvenile in possession of accurate information regarding his rights, ensures that he contacts a responsible adult not affiliated with the government, and provides an unconstrained opportunity to a hearing upon request.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

INSTRUCTIONS TO OFFICERS

This advisal is required to be given to all persons who are taken into custody and who appear, are known, or claim to be under the age of eighteen and who are not accompanied by one of their natural or lawful parents. No such person can be offered or permitted to depart voluntarily from the United States except after having been given this notice.

The required procedure distinguishes between two classes of minors.

1) The first class are those minors apprehended in the immediate vicinity of the border and who permanently reside in Canada or Mexico. These persons shall be informed that they have a right to make a telephone call to any of the persons mentioned in the notice. The purpose of this call is so that they can seek advice as to whether they should voluntarily depart or whether they should request a deportation hearing. We are required to make a record of any refusal to accept our offer of a telephone call.

2) As to all other minors, *they must not only be given access to a telephone, they must establish communication, telephonic or otherwise, with one of the persons listed in the notice* before they can be offered voluntary departure.

The INS retains the right to decide when to allow telephone calls. The only prohibition is that the minor cannot be asked to voluntarily depart until after telephone access is provided. If the minor is not offered voluntary departure but is put into deportation proceedings by issuance of an Order to Show Cause, this procedure is not necessary. It is our duty to make reasonable efforts to contact the person of the minor's choice, but after unsuccessful efforts to reach that person, we can facilitate contact with another such person. Whenever the minor elects to pursue a process, such as a call to a foreign country, which is operationaly unacceptable, we can always proceed to issue an Order to Show Cause.

The minor must tell the type of person that he/she talked to but need not give us that person's name or identifying information. If a minor, *of his/her own volition*, asks to contact a consular officer, this will satisfy the requirements of the notice.

The officer need not read the notice to the minor unless the minor is under 14 year of age, or unable to understand the notice. The officer must ask the minor whether he/she wanted to make a call, whether a communication was made and, if made, to whom. The officer must also verify whether the minor wanted voluntary departure or a hearing, and must sign and date the form to show this was done.

Officers are not to offer any advise to any minor as to what he/she should or should not do.

To be completed by the Officer:

I verify that;

1.a. ☐ The subject named was given this notice to read.
b. ☐ I read this notice to the name subject in the following language: _____

2.a. ☐ I asked this subject whether he/she wanted to make a telephone call, and offered assistance in the use of the telephone.

3.a. ☐ The subject told me that he/she did not want to make a telephone call, or
b. ☐ The subject told me that he/she established communication and the form was marked to indicate it;
c. ☐ The subject was unable to establish telephone communication with the desired individual. The following number of attempts were made: _____

4.a. ☐ The subject requested a hearing.
b. ☐ The subject admitted deportability and requested to return to his/her country voluntarily, without a hearing.

5.a. ☐ An order to show cause was issued because, the subject was unable to establish contact with any of the individuals specified after making the number of attempts indicated above (Item 3 c), and after assistance to establish contact was given or offered.

_____ _____

Signature of Officer

APPENDIX (1a)

3a

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Rights and Request for Disposition

Alien's Name: _____

A Number *(if any)*: **A -** _____

Your Rights.

You have been arrested because Immigration Agents believe that you are illegally in the United States. When you are arrested in the United States you have certain rights. No one can take these rights away from you. This paper explains your rights.

You have the right to use the telephone.

You may call your mother or father or any other adult relative. You may call your adult friend. If you do not know how to use a telephone, the immigration agent will help you.

You have the right to be represented by a lawyer.

Attached to this paper is a list of lawyers who can talk to you, and help you, for free. A lawyer can fully explain all of your rights to you, and can represent you at a hearing.

You have a right to a hearing before a judge.

The judge will decide whether you must leave or whether you may stay in the United States. If for any reason you do not want to go back to your country, or if you have any fears of returning, you should ask for a hearing before a judge.

If you do not want to have a hearing before a judge, you may choose to go back to your country without a hearing.

Reading this Notice:

☐ I have read this notice.
☐ This notice has been read to me.

Right to Use Telephone:

☐ I have contacted my parent(s) or a legal guardian by telephone.
☐ I have contacted an adult friend or relative by telephone.
☐ I do not want to talk to anyone by telephone.

Completion of the following is optional:

The person contacted is: (Relationship)

The person contacted is: (Name)

Right to be Represented by a Lawyer:

☐ I have spoken with a lawyer.
☐ I do not want to speak with a lawyer.

Right to a Hearing:

☐ I understand my right to a hearing before a judge.

☐ **I request a hearing before a judge.**

Signature: _____ Date: _____

☐ **I do not want to have a hearing before a judge.**
I am in the United States illegally and ask that I be allowed to return to my country, which is named below.

Country: _____

Signature: _____ Date: _____

Form I-770 (03/30/88)

Departamento de Justicia
Servicio de Inmigración y Naturalización

Aviso de los Derechos y Disposición

Nombre del extranjero:

Número del extranjero:
A -

Sus Derechos.

Usted ha sido arrestado porque Agentes del Servicio de Inmigración creen que usted esta ilegalmente en Los Estados Unidos. Al ser arrestado usted tiene ciertos derechos. Nadie puede quitarle estos derechos. Este documento le explica sus derechos.

Usted Tiene el Derecho de usar el Teléfono.

Usted puede llamar a su madre o padre o otro pariente. Used puede llamar a un amigo adulto. Si usted no sabe usar el teléfono, el agente del Servico de Inmigración le ayudará.

Usted tiene el Derecho de ser Representado Por Un Abogado.

Sin costo alguno, adjunto a este documento, se encuentran los nombres de abogados que pueden hablar con usted y ayudarlo. El abogado le puede explicar todos sus derechos y puede representarle en una audiencia.

Usted Tiene el Derecho a Una Audiencia ante el Juéz de Inmigración.

El juéz decidirá se usted debe de salir o si usted puede quedarse en Lost Estados Unidos. Si por alguna razón usted no desea regresar a su país, usted puedo pedir una audiencia ante el Juéz de Inmigración.

Si usted no desea una audiencia, usted puede regresar a su país.

Leyendo este aviso:

☐ He leído este aviso.
☐ Este aviso ha sido leído a mi.

Derecho de Usar el Teléfono:

☐ Me he communicado con mis padres o guardian legal.
☐ Me he communicado con un amigo adulto o pariente.
☐ Yo no deseo hablar con nadie por teléfono.

Completar lo siguiente es opcional: Parentescro de la persona a quien usted llamó.
Nombre de la persona a quien usted llamo.

Derecho de ser Representado por un Abogado:

☐ He hablado con un abogado.
☐ No deseo hablar con un abogado.

Derecho a una Audiencia:

☐ Yo entiendo mi derecho a una audiencia ante al Juéz de Inmigración.

☐ **Yo deseo una audiencia ante el juéz.**

Firma: _____ Fecha: _____

☐ **Yo no deseo una audiencia ante el juéz.**
Yo estoy en los Estados Unidos ilegalmente y deseo regresar a mi país.

Nación: _____

Firma: _____ Fecha: _____

Forma I-770 (03/30/88)

U.S. Department of Justice
Immigration and Naturalization Service

Notice and Request for Disposition

A-

Name of Alien

Notice

You are being detained by an Officer of the Immigration and Naturalization Service, because you are an alien who is in the United States illegally. This notice describes those options available to you. You must sign below to show that you have received a copy of this notice and understand it. Please read this notice carefully before deciding what you wish to do.

1. **Right to a Deportation Hearing**

You have the right to a deportation hearing to determine whether you may remain in the United States. If you request a deportation hearing, you may be represented at the hearing by counsel at no expense to the government of the United States. To insure your presence at your hearing you may be detained unless you are able to post a sum of money which you will lose if you do not appear. If you appear at all required hearings and other requests for appearance, your money will be returned.

2. **Opportunity for Voluntary Departure**

If you want to return to your home country, you may ask to be allowed to depart on the first available transportation. If your request is granted you will give up your opportunity for a deportation hearing and your opportunity to apply for other relief. If you change your mind at any time before you actually go home you will be given a deportation hearing.

3. **Representation by Counsel**

You may be represented by counsel of your choice at no expense to the Government of the United States. If you wish legal advice and cannot afford it, you may ask for a list of available free legal services. You may contact counsel at this time or at any time prior to your departure from the United States.

4. **Communication with Consul**

You may talk to the consular or diplomatic officers of your country or nationality.

Request for Disposition

I acknowledge that I have received a copy of the above notice and understand it.

I understand my options and I request one of the following dispositions of my case. I understand that if the Government pays for my transportation out of the United States, I cannot return for five years unless I first obtain permission from the Attorney General.

1. I wish to request a hearing before an Immigration Judge to determine whether I may remain in, or will be deported from the United States.

Date and Time:_____ _____ _____
Signature Witness

2. I admit that I am in the United States illegally. I wish to give up my right to a hearing before an an Immigration Judge and return to my home country on the first availabe transportation. I understand that I may be held in detention until my departure.

Date and Time:_____ _____ _____
Signature Witness

☐ Form read to alien by officer.
☐ Form read by alien.

Remove at expense of: ☐ Government - Cost $ _____ Request for voluntary departure approved:

☐ Alien - Cost $ _____ _____
Signature and Title

_____
Date

Form I-274 (06/27/84)Y

6.2

U.S. Department of Justice
Immigration and Naturalization Service

Aviso y Peticiόn de Disposiciόn

A-

Nombre del extranjero

Aviso

Usted está detenido por un oficial del Servicio de Inmigratiόn y Naturalizatiόn porque Usted es un extranjero que está en los Estados Unidos ilegalmente. Este aviso describe las opciones que usted tiene a su disposiciόn. Es necesario que firme abajo para mostrar que Usted ha recibido una copia de este aviso y que lo comprende. Favor de leer el aviso cuidadosamente antes de decidir lo que desea hacer.

1. **Derecho a una Audiencia de Deportatiόn**
   Usted tiene el derecho de tener una audiencia de deportaciόn para determinar si Usted puede permanecer en los Estados Unidos. Si pide una audiencia de deportaciόn, Usted puede ser representado en la audiencia por consejero sin coste al Gobierno de Los Estados Unidos. Para asegurar su presencia a la audiencia, Usted puede ser detenido a menos que pueda poner una cantidad de dinero que perderá si no se presenta. Si se presenta a todas las audiencias necesarias, se le devolverá todo el dinero.

2. **Oportunidad de Salida Voluntaria**
   Si desea regresar a su país, puede pedir que le permitan salir en el primer modo de transporte. Si le conceden su peticiόn, Usted renuncia la oportunidad de tener una audiencia de deportaciόn y su oportunidad de solicitar otro beneficio. Si desea cambiar su decisiόn en cualquier momento antes de partir para su país, se le concederá una audiencia de deportaciόn.

3. **Representaciόn por Consejero**
   Usted puede ser representado pro un consejero de su preferencia sin coste al Gobierno de Los Estados Unidos. Si desea consejo legal y no tiene los medios para pagarle a un consejero, puede pedir una lista de servicios legales gratis al público. Usted puede comunicarse con su consejero ahora o en cualquier momento antes de su salida de los Estados Unidos.

4. **Comunicaciόn con el Cónsul**
   Usted puede hablar con los oficiales del cónsulado y oficiales diplomáticos de su país o nacionalidad.

Peticiόn de Disposiciόn

Reconozco que he recibido una copia del aviso antenombrado y que lo comprendo.

Comprendo mis derechos y solicito una de las siguientes disposiciones en mi caso. Comprendo que si el gobierno paga por mi viaje de salida de los Estados Unidos, no podré regresar por cinco años a menos que primero obtenga permiso del Procurador General.

1. Deseo pedir una audiencia ante el Juez de Inmigraciόn para determinar si puedo permanecer en los Estados Unidos o ser deportado.

Fecha y hora: _____ _____ _____
Firma Testigo

2. Admito que estoy en los Estados Unidos ilegalmente. Deseo renunciar mi derecho a una audiencia ante el Juez de Inmigraciόn y regresar a mi país en el primer modo de transporte disponible. Comprendo que puedo estar detenido hasta el momento de mi partida.

Fecha y hora: _____ _____ _____
Firma Testigo

☐ El aviso se le fue leído al extranjero por el oficial.
☐ El aviso fue leído por el extranjero.

Remove at expense of: ☐ Government - Cost $ _____ Request for voluntary departure approved:

☐ Alien - Cost $ _____ _____
Signature and Title

_____
Date

Form I-274 (06/27/84) Y

9a

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. _____

In the Matter of

Respondent.

_____
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of _____ and a citizen of _____;
3. You entered the United States at _____ on or about _____;
(date)

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at _____

_____

on _____ at _____ m, and show cause why you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated:

_____
(signature and title of issuing officer)

_____
(City and State)

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charge set forth therein. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☐ Detained in the custody of this Service. ☐ Released on recognizance.

☐ Released under bond in the amount of $ _____ .

You may request the Immigration Judge to redetermine this decision.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

_____ _____

(signature of respondent) (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

_____ _____

(signature of respondent) (date)

CERTIFICATE OF SERVICE

Served by me at _____ on _____ 19___ at _____ m.

_____

(signature and title of employee or officer)

-01

TM 89 5-3.11 August 31, 1981

I & NS INVESTIGATOR'S HANDBOOK

• • • •

Warning of Rights

When personal delivery of an order to show cause is made by an immigration officer, the contents of the order to show cause shall be explained and the respondent shall be advised that any statements he makes may be used against him in subsequent proceedings. Aliens shall also be advised of their rights to representation by counsel of their own choice at no expense to the Government. They shall also be advised of the availability of free legal services programs and organizations recognized pursuant to 8 CFR 292.2 located in the district where their deportation hearings will be held. They shall be furnished with a list of such programs, and with a copy of I-618, "Written Notice of Appeal Rights", regardless of the manner in which the service of the order to show cause was accomplished. Service of these documents shall be noted on Form I-213. If an interpreter is used for this purpose, the interpreter shall append the certification on the reverse of the order to show cause.

• • • •

MEMORANDUM [SEAL]

Subject Date Dec. 13, 1991

National Policy Regarding
Detention and Release of
Unaccompanied Alien Minors

To

Regional Operations Liaison Officers
District Directors
Chief Patrol Agents

From

Office of the Commissioner

The purpose of this memorandum is to standardize the procedures nationwide regarding the detention, release, and treatment of unaccompanied alien minors in INS custody. This memorandum should be distributed to all INS field personnel.

The policy of the Immigration and Naturalization Service (INS) regarding the detention and release of unaccompanied alien minors is as follows:

1) All alien minors[1] apprehended by INS or turned over to the custody of INS by state or local law enforcement agencies are to be processed for deportation or voluntary departure in accordance with 8 C.F.R. § 242.24(g) and (h).

2) While awaiting processing, alien minors may be held by INS authorities in INS detention facilities

[1] An alien minor is defined as a male or female foreign national, under 18 years of age, who is the subject of exclusion or deportation proceedings under the Immigration and Nationality Act (Act) or has an application for asylum pending before the INS.

having separate accommodations for juveniles or, if such accommodations are unavailable, in suitable state or county juvenile detention facilities.[2]

3) No alien minor may be held in a detention facility, whether an INS facility or otherwise, longer than 72 hours unless the alien minor:

a) is charged with or convicted of a criminal offense, other than entry without inspection;

b) is adjudicated a delinquent, or is the subject of a pending delinquencey proceeding;

c) has engaged in violent or extremely disruptive conduct which requires that he or she be held in a secure facility for the safety of himself or herself and/or others;

d) is an escapee from another facility;

e) is an unrepresented Salvadoran and an alternative placement is unavailable in the district where the juvenile came into INS custody (in which case the alien minor may not be transferred from the district for at least seven days); or

f) cannot be moved for other extraordinary and compelling reasons. In this case, permission from the Juvenile Coordinator or Assistant Commis-

[2] A suitable juvenile detention facility is defined as a secure facility designated for the occupancy of juveniles. Juveniles charged with delinquent acts are held in these facilities for a temporary period while awaiting adjudication of their court cases. Every effort must be taken to ensure that the safety and well-being of the alien minors detained in these facilities are satisfactorily provided for by the detention staff at the juvenile detention facilities.

sioner for Detention and Deportation must be obtained before detaining the alien minor for longer than 72 hours.

4) Except for (3) above, an alien minor shall be released from INS custody, in the following order of preference, to:

a) A parent, legal guardian, or adult relative (brother, sister, aunt, uncle, grandparent);

b) A responsible adult designated by the parent or legal guardian in a sworn affidavit;

c) A licensed child-care facility [3] including a foster home, group home, temporary boarding home, or facility for the housing of neglected, abused, or emotionally disturbed children.

5) Before an alien minor may be released from INS custody, the person or facility assuming custody must execute an agreement to:

a). provide for the alien minor's physical, mental, and financial well-being;

b) ensure the alien minor's presence at all future proceedings before the INS or immigration judge;

c) notify INS of any changes in address of the alien minor; and

[3] A child-care facility is defined as a facility that provides care, training, education, custody, treatment, or supervision for a minor who is not related by blood, marriage, or adoption to the owner or operator of the facility, whether or not the facility is operated for profit. Licensed means approved by the appropriate state agency. An INS detention facility or a state or county juvenile detention facility is *not* a child-care facility under this definition.

d) not transfer custody of the minor to another person or facility without prior written permission of the District Director or chief patrol agent.

6) INS shall assist, without undue delay, with transportation arrangements to the INS office nearest to the location of the person or child-care facility to whom the alien minor is to be released.

7) INS may require the posting of a bond to ensure the presence of the alien minor at all future immigration proceedings.

8) If the alien minor cannot be released as set forth in paragraphs (4) and (5) above within 72 hours, INS shall place the alien minor temporarily in an INS-contracted group or foster home until such time as release in accordance with paragraphs (4) and (5) can be effected or until the conclusion of the immigration proceedings, whichever is earlier. The unavailability of an INS-contracted child-care facility within the jurisdiction of the INS district sector in which the alien is being held does not justify detention for more than 72 hours in a juvenile or adult detention facility, except in extraordinary and compelling circumstances and with the permission of the Juvenile Coordinator or Assistant Commissioner for Detention and Deportation.

9) An alien minor should be transferred from one child-care facility to another only in the most compelling circumstances. The alien minor should be transferred with all his possessions and his legal papers. No minor who is represented by counsel in an INS proceeding shall be transferred without advance notice to such counsel, nor shall any minor be denied access to legal services at the location to which he or she is transferred.

10) The 72 hour limit for detention of alien minors commences when INS assumes custody of the juvenile.

11) The Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation shall maintain an up-to-date record of all alien minors in INS custody. Statistical information shall be collected weekly from all INS District Offices.

Any questions regarding this national policy should be directed to Mary Ruth Calhoun, Juvenile Coordinator, HQDDP, at FTS 368-4120 or Patricia B. Feeney, Assistant General Counsel, HQCOU, at FTS 368-2895.

/s/ Gene McNary
GENE MCNARY
Commissioner

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 312324 45399